STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2003
v	Nos. 237203; 241763 Oakland Circuit Court
RAYMOND LANDAUER, Defendant-Appellant.	LC No. 2001-176393-FC

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of assault with intent to do great bodily harm less than murder, MCL 750.84; arson of a dwelling house, MCL 750.72; felonious assault, MCL 750.82; and resisting and obstructing a police officer, MCL 750.479. The trial court sentenced defendant to fifty-one months to ten years' imprisonment for the assault conviction; fifty-one months to twenty years' imprisonment for the arson conviction; two to four years' imprisonment for the felonious assault conviction; and one to two years' imprisonment for the resisting and obstructing conviction. Defendant appeals as of right. We affirm.

Rosemary Armstrong testified that she lived next door to defendant for four years in a one-level apartment building. She indicated that they did not get along and that defendant would use the despicable expression "niggers" when referring to her. On August 18, 2000, Ms. Armstrong recalled that defendant was sitting outside his apartment drinking beer and appeared to be intoxicated. She claimed that he was talking "about niggers" over a homemade CB radio. Ms. Armstrong heard defendant say that he was "tired of this nigger" and thought that he was referring to her. Ms. Armstrong told defendant that she grew weary of his remarks. In reply, defendant stated, "I'm going to get the Ku Klux Klan and blow your, blow your big nigger a-- up out of here." After this exchange, Ms. Armstrong stated that she went inside her apartment. Shortly thereafter, she saw defendant bend down by her door and heard him say, "Rose[,] this is what we do to niggers. We burn them out." Ms. Armstrong alleged that she then smelled charcoal lighting fluid and saw flames in the front door of her apartment. She claimed that the front door was the only exit from her apartment.

Faiz Henry testified that he observed defendant throw something at Ms. Armstrong's front door that caused it to erupt in flames. Mr. Henry immediately ran to the apartment and helped Ms. Armstrong escape through a broken window. Both Mr. Henry and Ms. Armstrong were injured during this process and Ms. Armstrong ultimately required stitches. Mr. Henry

stated that after the incident he knocked on defendant's door, and defendant told him "to get away from his door" or he would blow his "mother f---ing head off."

When the police arrived they were forced to break through defendant's locked door to arrest him for the arson. Once inside defendant's apartment, Officer Kyle Hayes testified that he saw defendant pick up a knife and throw it toward Officer Robert Elinski. Officer Elinski stated that the knife hit his right forearm. Both officers claimed that defendant resisted arrest.

I

Defendant argues that there was insufficient evidence to support his conviction of assault with intent to do great bodily harm. Specifically, he asserts that the prosecution failed to prove that an assault occurred. We disagree. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).[1]

The crime of assault with intent to do great bodily harm less than murder requires proof of (1) an assault, and (2) an intent to do great bodily harm. See *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Defendant opines that setting fire to Ms. Armstrong's doorway did not "involve the requisite 'touching' or the attempt to touch" in order to constitute an assault. However, an assault is defined as "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979).

Defendant cites this Court's decision in *People v Long*, 246 Mich App 582; 633 NW2d 843 (2001), for the proposition that an arson does not constitute an assault. We find this reliance misplaced. In *Long*, the defendant tied up his victim and set fire to an aerosol can in the living room. *Id*. at 589-590. This Court concluded that a rational fact-finder could conclude from these facts that the defendant was guilty of attempted murder, rather than assault with intent to murder.[2] *Id*. at 590. However, it appears that this decision was based on the fact that attempted murder and assault with intent to murder are mutually exclusive crimes. *Id*. at 589. An individual cannot be convicted for both crimes on the basis of the same criminal transaction. The defendant in *Long*, therefore, could not be convicted of assault with intent to murder because the underlying facts already formed the basis for the attempted murder charge. *Id*. 589-590.[3]

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[1] Contrary to the prosecution's claim, we find no record evidence that defendant stipulated during trial to the entry of a conviction for assault with intent to do great bodily harm. *Cf People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

[2] We note that *Long*, *supra* at 589, stated that attempted murder "provide[s] punishment for those attempts at murder that *do not involve an assault*." (Emphasis added).

[3] Additionally, it appears that the defendant in *Long*, *supra* at 589-590, actually committed a battery when he tied up his victim. See *People v Rivera*, 120 Mich App 50, 55; 327 NW2d 386 (1982).

After reviewing the record in this case, we conclude that a rational trier of fact could find sufficient evidence to support defendant's conviction of assault with intent to do great bodily harm. Defendant verbally threatened to burn Ms. Armstrong out of her home and set fire to the only doorway leading from her apartment. Shortly before this, defendant told Ms. Armstrong that he was "going to get the Ku Klux Klan and blow [her] . . . out of here." The threats and subsequent torching of Ms. Armstrong's front door evidence an intent to cause her great bodily harm and clearly put her in fear of an imminent battery. See *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992).

II

Defendant further asserts that his conviction for assault with intent to do great bodily harm should be vacated because it was not a necessarily included lesser offense of attempted murder. Our Supreme Court has recently determined that a defendant may not be convicted of an uncharged cognate lesser-included offense. *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002); see also *People v Pasha*, 466 Mich 378, 384, n 9; 645 NW2d 275 (2002). However, the Court expressly limited its decision "to those cases pending on appeal in which the issue has been raised and preserved." *Cornell, supra* at 367. Defendant failed to preserve this claim of error by objecting to the trial court's consideration of the lesser offense. *Id.*

III

Defendant next argues that the trial court abused its discretion and imposed a disproportionate sentence when it refused to depart from the guidelines sentencing range for defendant's arson conviction.[4] We disagree.

According to MCL 769.34(10):

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

While defendant acknowledges that MCL 769.34(10) precludes review of this issue, he claims that the statute is unconstitutional as a violation of separation of powers, the right to due process, and the state constitutional right to appeal.

However, "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45. Accordingly, for cases governed by the Legislature's sentencing guidelines, proportionality review is inappropriate except where the trial court has exercised its statutorily granted discretion to depart from the sentencing range recommended by the guidelines. *Hegwood, supra* at 437, n 10; *People v Babcock*, 250 Mich App 463, 468-469;

[4] Defendant's brief incorrectly indicates that he received a nine-year minimum sentence for armed robbery. We note that defendant was not charged or convicted of armed robbery in this case.

648 NW2d 221 (2002). We further note the principle established with regard to the former judicially adopted sentencing guidelines that "[a] sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate." *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000).

Moreover, defendant has failed to present any substantial and compelling reasons for departure. MCL 769.34(3). As stated in *Babcock*, *supra* at 466-467 "substantial and compelling reasons exist only in exceptional cases and . . . the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence." In the instant case, defendant was in his mid-seventies at the time of sentencing and did not have a criminal history. Nevertheless, while the trial court sentenced defendant to the minimum sentence within the guidelines, it refused to make a downward departure given the "serious" nature of the offenses. After reviewing the record, we cannot conclude that the trial court abused its discretion. See *id*. at 467.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly